

Dated this 18<sup>th</sup> day of January, 2001.

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CERTIFICATE OF SERVICE

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Consolidated Telephone Cooperative,)

nka Consolidated Telcom, )

Appellant, )

vs. )

Western Wireless Corporation and )

North Dakota Public Service )

Commission, )

Appellees. )

Case No. 08-99-C-02486/001

**BRIEF OF APPELLANT CONSOLIDATED TELCOM**

## BRIEFS

Appellant filed a Brief with the Court dated January 3, 2000. That Brief is incorporated by reference and will not be repeated herein. This Brief will address the additional evidence and the hearing on remand.

## NATURE OF PROCEEDINGS

The North Dakota Public Service Commission (PSC) held that it was federally preempted from imposing any requirement on Western Wireless Corporation (Western Wireless) for a Certificate of Public Convenience and Necessity for its Wireless Residential Service (WRS) in Regent, North Dakota, because such service was a "mobile" service. This proceeding, Case No. PU-1564-99-17, was appealed from the PSC to the State District Court, Burleigh County. On January 18, 2000, the State District Court remanded the matter to the PSC to receive additional evidence. The PSC entered its Findings of Fact, Conclusions of Law and Order on Remand on November 22, 2000, confirming its earlier Order of August 31, 1999, and the matter is back before this Court.

## THE PARTIES AND THE PRINCIPAL FACTS

Western Wireless, aka Cellular One, provides mobile cellular telephone service in North Dakota under licenses issued by the Federal Communications Commission (FCC).

Consolidated Telcom (Consolidated) provides landline local exchange telecommunications service in a number of local exchange areas in the counties of Adams, Billings, Bowman, Dunn, Hettinger, McKenzie, Slope and Stark in southwestern North Dakota, under certificates of public convenience and necessity issued by the North Dakota PSC pursuant to the provisions of Chapter 49-03.1, NDCC. Regent is one of the communities served by Consolidated.

"Cellular" is a term commonly used to describe a certain category of telecommunications service. Cellular service is included in the definition "commercial mobile service", 47 U.S.C. 332(d)(1) and its synonym "commercial mobile radio service" (CMRS), 47 C.F.R. 20.3 and 20.9. "Cellular" usually connotes commercial mobile radio in a certain spectrum. Radio telephone service is commonly called "wireless", as distinguished from wired service which is also called wireline or landline service. Under Section 332 of the Telecommunications Act, no state or local government has authority to regulate market entry of or the rates charged by any provider of commercial mobile service.

On August 21, 1998, Western Wireless submitted an Access Service Request ("ASR") to Consolidated for 2000 direct inward dialed (DID) numbers and a local T-1 circuit with six trunks at Regent, North Dakota. The ASR did not indicate that the service would be used for the provision of fixed residential service by

Western Wireless. Consolidated had previously provided similar service to Western Wireless for its cell site located in Consolidated's Bowman exchange for use by Western Wireless cellular mobile customers. The service requested was installed and turned up for service on September 18, 1998.

On January 7, 1999, Western Wireless initiated "Wireless Residential Service" (WRS) a wireless local loop offering designed to compete with the local services offered by Consolidated in Regent. These services were made possible by Western Wireless' purchase from Consolidated of a local DID trunk to route calls from Consolidated's customers to Western Wireless' customers, along with Consolidated's assignment to Western Wireless of 2000 local telephone numbers.

The WRS service offered by Western Wireless is provisioned by giving each subscriber a "black box" approximately the size of a lap top computer which is designed to be hung on a wall. The box functions as a radio transmitter and receiver, but requires the connection of a standard telephone and power either from a standard outlet or its internal batteries in order for a subscriber to place or receive calls. Although the box is transportable, it is not designed or intended to be used in mobile services.

While conducting discovery in a federal court suit brought by Western Wireless against Consolidated, Consolidated was provided

with evidence which had not been produced at the initial PSC hearing on this matter. The additional evidence consisted of two documents: a Residential Service Demo/Loaner Equipment Agreement and a Wireless Residential Service Agreement. Both of these agreements specifically state that **"The unit is intended to remain stationary."** They warn the customer that moving the unit may result "in substantial additional fees to you, failure of the Unit, and/or termination of the agreement."

This Court ordered that the PSC consider this newly discovered evidence. After a hearing on remand, the PSC affirmed its earlier decision.

### ISSUE

Is Western Wireless Corporation's WRS offering in Regent a radio-communications station **which ordinarily does move?**

ANSWER: No. Although transportable, Western Wireless and its customers intended that the device remain stationary and it does not ordinarily move.



## ARGUMENT

The tellular device used by Western Wireless for its WRS service in Regent, North Dakota, is not a device which ordinarily does move and therefore WRS is not a "mobile" service.

Section 332(c)(3) of the Federal Telecommunications Act provides:

[N]o state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . ."

It is uncontested that if the Wireless Residential Service Western Wireless is offering in Regent, and intends to offer statewide, is a "commercial mobile service" as defined by federal law, then entry regulation by the PSC is prohibited. The question is whether this service is commercial mobile service.

WRS service is designed to provide an alternative to the local exchange service offered by wireline telephone companies, but Western Wireless has attempted to "spin" the nature of its offering to squeeze it into the mobile definition. There is no dispute that the offering is "commercial" or that it is a "service". It is strongly disputed, however, that the offering is "mobile".

Western Wireless argues that because the subscriber premise equipment can be transported from one residence to another, and can operate on batteries instead of house current, the service offered is "mobile". The Communications Act requires a different result.

The Act defines "mobile service" as:

[R]adio communications service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . 47 U.S.C. 153(27).

"Mobile station", in turn is defined as:

A radio-communications station capable of being moved **and which ordinarily does move.** (Emphasis supplied)

This is the language in the statute and **it is very important language** which the PSC has chosen to overlook or ignore. The simple issue, then, is whether the device used in Regent, North Dakota, is a radio-communications station which ordinarily does move.

The agreements which Western Wireless had with its customers required that the units remain stationary. If they are required to remain stationary, then they do not ordinarily move. Therefore, they are not mobile.

Although the black box which Western Wireless places on the subscriber premises to complete its wireless loop may be "capable of being moved", it is neither intended to be moved nor is it "ordinarily moved." It does not meet the statutory definition of "mobile service."

Western Wireless cannot successfully argue that although the contracts were in effect, they didn't enforce the provision, and the contracts can be ignored. The contract provisions are legally

enforceable and have to be taken at their face value.

It takes no more than common sense and every day knowledge to understand that "ordinary" users with a need for mobile communications will not carry with them a box the size of a laptop computer and a regular telephone, when shirt pocket sized mobile units are readily available on the market.

The real reason Western Wireless required the devices to remain stationary was because if moved, the effect would be to cannibalize its real mobile service. Since the WRS offers unlimited calling for \$14.99 per month, customers to the mobile service with similar calling scope requirements would abandon traditional cellular service which charges more and charges on a per minutes basis.

Western Wireless's position continues to be that regardless of its operational characteristics, and their own requirement that the device remain stationary, the Wireless Residential Service is exempt from state entry regulation under Section 332(c)(3) because the FCC considers the service "ancillary" to a commercial mobile service and therefore legally a mobile service, even if it is not in fact mobile. This claim is wrong. Western Wireless produced no evidence and no expert testimony to establish that the WRS service is ancillary to its commercial mobile service.

Western Wireless previously acknowledged that the issue of the

regulatory status of fixed wireless service, other than ancillary, auxiliary and incidental, was the subject of an open FCC proceeding. The FCC has now explicitly ruled, in its Second Report and Order and Order on Reconsideration in FCC 00-246, which is now part of the record in this case, that it will not adopt the rebuttal presumption that fixed and integrated/fixed mobile services are mobile. The ruling states ". . . it is difficult to set out in advance factors that we should consider in establishing such a presumption or otherwise determining the regulatory treatment of any particular fixed wireless or integrated fixed/mobile service." In other words, the proposed rule that was before the FCC in August of 1999, when the PSC first ruled on this matter has been rejected by the FCC.

At paragraph 7 of FCC's 00-246, the FCC acknowledges that CMRS providers can offer mobile customers an increasing variety of services including data transmission, internet access and other services traditionally associated with fixed service. Thus, the FCC states, ". . . we believe it is inappropriate to establish a bright line test". A bright line test, the FCC goes on to state, might even limit or discourage the development of services.

What this means is that the WRS service in Regent is before this Court on its own facts without any presumption that it is mobile. The facts now before the Court show that Western Wireless

intended that the device remain stationary. There are no facts which support a conclusion that it is mobile.

The evidence introduced by Consolidated as exhibits 7 and 8 show the intent of Western Wireless that their device remain stationary. A witness for Western Wireless attempted to explain why that language was inserted into the contracts. From her own testimony, it is clear that the witness is not qualified to address the issue. ReAnn Kelsch described herself as the Manager of External Affairs. Tr. at page 33. She stated that the language was inserted in the agreements by the Sales & Marketing Group. Tr. at page 37. She acknowledged that it did not make any difference who requested the provision in the contract as to whether it was enforceable. Tr. at page 45. She admitted that she did not know the meaning of "failure of the unit". Tr. at page 46. In response to a question about service quality, she said "that was the indication that we have gotten from Sales & Marketing." Tr. at page 51. She was uncertain as to why language was inserted involving additional fees. Tr. at page 57. She couldn't even answer the question of why language was put in regarding termination of the agreement. Tr. at page 59.

Her attempted explanation was that the Marketing Department requested that this language be inserted in the contracts because if the device was moved, the service may not be as good. Tr. at

pages 37 and 38. She said that Western Wireless recommended ". . . to our customers that they keep the equipment in its original location. . . ." Tr. at page 38.

Ms. Kelsch admitted that the agreements unequivocally state that the devices cannot be moved. Tr. at page 44.

These responses do not explain why additional fees would be due or why the contract would be terminated if the device was moved. The plain truth is that the language was inserted in the agreements because Western Wireless did not intend the devices to be moved, they intended them to remain stationary. They didn't want any difficulty in locating and repossessing the tellular device in the event the customer did not pay his or her bill and they didn't want the device to compete with the marketing of their traditional cellular service.

Western Wireless attempted to change its agreements after it became aware that Consolidated was going to bring the agreements to the attention of the PSC. Tr. at page 56. Regardless of whether they changed the agreements or not, the documents establish the clear intent of Western Wireless that the devices remain stationary. If they were intended to remain stationary, they do not fit the statutory definition of mobile service "and which ordinarily does move."

Whatever the reasons for the insertion of the language in the

contracts, Western Wireless did restrict the movement of the tellular device. None of the testimony at the rehearing explained how their intent that the devices remain stationary has changed.

Consolidated believes that the Court must make its ruling based upon the evidence as it existed on August 31, 1999. This Court did not direct the PSC to reopen the case, it directed the PSC to consider additional evidence. However, regardless of what date is used in reaching its decision, the documents clearly evidence the intent of Western Wireless that the devices remain stationary and hence were not of the type that ordinarily move.

A device which by contract must remain stationary is not a device "which ordinarily does move." The service provided in Regent is not mobile service and therefore is not exempt from regulation under §332.

#### **SUMMARY and CONCLUSION**

Even though the telecommunications regulatory climate has changed in the direction of deregulation, telecommunications remains a regulated industry under both federal and state laws. Radio spectrum is licensed only by the FCC. The use of radio spectrum for wireless mobile telephone service is not subject to state rate and entry regulation. Federal regulations do not restrict the use of radio spectrum for wireless telephony to mobile service; radiotelephony to fixed locations is permitted under

federal regulations.

The use of radio spectrum for fixed telephone service is, however, subject to state regulation. Specifically, under § 332 of the Act, mobile wireless service is federally licensed and States have no jurisdiction as to market entry or rates. The plain meaning of the word "mobile," the preservation of state authority (47 U.S.C. 152(b), 221(b) and 253(b), and the provisions of North Dakota's telecommunications statutes (NDCC 49-03.1 affecting certification of public convenience and necessity) combine to compel this conclusion: North Dakota's statutory PCN processes apply equally to wireless and wireline providers of facilities based telecommunications service to fixed stations.

The "M" in CMRS means mobile. The preemption of CMRS under 47 U.S.C. 332 does not exempt Western Wireless' fixed wireless service from state regulation, including the requirement that service not be offered without a certificate of public convenience and necessity, under NDCC 49-03.1. Western Wireless should be required to obtain a certificate of public convenience and necessity before utilizing its wireless infrastructure to provide telecommunications service to fixed locations.

State jurisdiction unquestionably exists under NDCC §49-03.1 unless federal authorities have taken preemptory action. The PSC should not be permitted to surrender or abandon this State's



jurisdiction in the absence of federal preemptive action.


State regulation of wireless telephone service is preempted only if the service is mobile service, and only if the service is provided to instruments that ordinarily move. The evidence presented, including the evidence on remand, clearly show that the device was to remain stationary and was not intended to be moved. WRS as offered in Regent, North Dakota, is not mobile service and is not exempt from State regulation.

Dated this 5th day of January, 2001.

Respectfully submitted,

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**CERTIFICATE OF MAILING**

A true and correct copy of the foregoing **BRIEF OF APPELLANT CONSOLIDATED TELCOM** was on the 5th day of January, 2001, mailed to Gene DeJordy, Executive Director of Regulatory Affairs, Western Wireless Corporation, 3650 131st Avenue, S.E., Suite 400, Bellevue, WA 98006; and Thomas D. Kelsch, Attorney at Law, P.O. Box 1266, Mandan, ND 58554-1266.

  
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February 3, 2000

HAND DELIVERED  
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RE: Consolidated Telephone Cooperative v. Western Wireless Corporation, and North Dakota  
Public Service Commission  
Appeal No. 99-C-2486  
Our File No. 8451

Dear Clerk:

Enclosed for filing is the Brief of Appellee Western Wireless Corporation. Please note that the original Declaration of Gene DeJordy will be forthcoming. Thank you for your attention to this matter.

Respectfully yours,



Thomas D. Kelsch

ve  
Enc

c: Western Wireless Corporation  
Ronnie London, Esq.  
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(fax and mail)

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Consolidated Telephone Cooperative, )

Appellant )

vs. )

Case No. 08-99-C-02486/001

Western Wireless Corporation )

and )

North Dakota Public Service )

Commission, )

Appellees )

**BRIEF OF APPELLEE WESTERN WIRELESS CORPORATION**

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## STATEMENT OF THE CASE

Western Wireless Corporation, d/b/a Cellular One ("Western Wireless"), is licensed by the Federal Communications Commission ("FCC") under the Communications Act of 1934, as amended ("Federal Act"), to provide cellular telecommunications service primarily in rural markets in 17 western states, including North Dakota. Significantly, as a cellular service provider, Western Wireless is classified and regulated as a "commercial mobile radio service" or "CMRS" provider under Section 332 of the Federal Act. 47 U.S.C. § 332. Section 332(c)(3)(A) of the Federal Act, 47 U.S.C. § 332(c)(3)(A), provides, *inter alia*, that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . ." Consistent with Section 332(c)(3)(A), the FCC has adopted a comprehensive set of rules and policies that govern the technical, operational, and legal parameters of CMRS, and that define the permissible services CMRS providers may offer.

Over the years, cellular service has become more and more prevalent in the lives of Americans, with many people now using cellular telephone service as their primary, and sometimes only, telephone service. In 1999, Western Wireless introduced a new CMRS offering aimed at a segment of the market that wanted the convenience of mobility but also the capabilities of traditional "dial tone" telephone service. This new service, called Wireless Residential Service ("WRS"), was introduced in January 1999 as a market trial in Regent, North Dakota.

WRS is identical to conventional cellular service in most respects.

Western Wireless provides WRS using the same existing cellular network facilities that it uses to provide conventional cellular service, including the same radio-spectrum frequencies and the same antennas, transmitters, receivers, and antenna towers. The only technical difference is in the equipment used by customers to originate and terminate telephone calls. Rather than using an ordinary cellular phone, WRS customers use a special form of equipment, referred to as "WRS Units," that, like ordinary cellular phones, can be used in mobile applications. At the same time, WRS Units are capable of being interconnected with the telephone devices that consumers typically use, such as home telephones, computers, and facsimile devices.

The WRS Unit acts like a portable version of the phone jack in the wall of a residence. It allows WRS subscribers to attach any type of consumer telecommunications device and become connected to the public switched network by a wireless (cellular) connection between the WRS Unit and the cellular tower. Much like ordinary cellular phones, the WRS Unit operates on battery backup, but when operated in the home or other location with commercial power, the unit can be powered by commercial power. As such, like any other cellular phone user, WRS subscribers can take their phones anywhere they go, whether it be another dwelling or business, a mountaintop, or even in a subscriber's car or truck.

Western Wireless began offering WRS on Thursday, January 7, 1999, using its cellular network facilities in Regent. In order to allow Western Wireless' WRS and other cellular customers in Regent to originate and terminate local

telephone calls with consumers served by the local telephone company, Consolidated Telephone Cooperative ("Consolidated"), Western Wireless obtained 2000 direct inward dialed ("DID") phone numbers and six trunks from Consolidated. As an incumbent local exchange carrier, Consolidated is required under federal and state law to provide these type of interconnection services to other telecommunications carriers, like Western Wireless.

The following Monday, January 11, 1999, Consolidated unilaterally disconnected interconnection service, thereby cutting off Western Wireless' customers' connection to the public switched telephone network, including access to emergency 911 services. This action by Consolidated effectively eliminated Western Wireless' ability to provide and market WRS. A few weeks later, facing significant liability and the threat of enforcement orders requested by Western Wireless from both the FCC and the PSC, Consolidated reconnected the interconnection service.

In response to Western Wireless' pending complaint at the PSC seeking injunctive relief for Consolidated's unauthorized and anti-competitive conduct, Consolidated filed a counterclaim with the PSC. Consolidated argued that Western Wireless was required to obtain entry authority from the PSC (a certificate of public convenience and necessity) before providing WRS. The PSC granted the relief sought in Western Wireless' complaint and rejected Consolidated's counterclaim in an Order issued on August 31, 1999.<sup>1/</sup> The PSC imposed a fine upon Consolidated for

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<sup>1/</sup> *Western Wireless Corp. v. Consolidated Tel. Coop.*, Case No. PU-1564-99-17, Findings of Fact, Conclusions of Law and Order (Aug. 31, 1999) ("Order").



disconnecting DID service to Western Wireless. The PSC also found, contrary to Consolidated's counterclaim, that Western Wireless' WRS, as CMRS under federal law, did not need a PSC entry certificate, but rather is exempt from state rate and entry regulation under Section 332(c)(3)(A) of the Federal Act. Consolidated appealed the PSC's Order denying Consolidated's counterclaim.

### **ISSUES PRESENTED**

1. Whether a reasoning mind could reasonably determine that the PSC's factual conclusion – that Western Wireless' WRS offering is a commercial mobile radio service ("CMRS") as defined under federal law – was supported by the evidence.

2. Whether the PSC's legal conclusion that Western Wireless' WRS offering, as a form of CMRS, is exempt from state rate and entry regulation and not subject to the state requirement for a certificate of public convenience and necessity, was supported by the agency's factual findings.

### **SUMMARY OF THE ARGUMENT**

This Court must affirm the PSC's decision to not impose North Dakota's certification requirement on Western Wireless' WRS offering. First, the PSC's factual conclusion that WRS is a CMRS offering is supported by the weight of the evidence in the record, including testimony that WRS can readily be used in mobile applications. Second, Consolidated concedes that if WRS is a CMRS offering, the PSC is preempted from imposing state entry regulation, such as the certification requirement, on WRS. Thus, the PSC's clearly correct legal conclusion that federal law precludes the PSC from requiring entry certification for WRS logically flows from the factual determination that WRS is a "commercial mobile radio service" as defined by the